Filed 12/15/16 In re K.K. CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re K.K. et al., Persons Coming Under the Juvenile Court Law.	
SAN MATEO COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. S.K. et al., Defendants and Appellants.	A148596 (San Mateo County Super. Ct. Nos. 84695, 84696)

S.K. appeals from the order of the juvenile court denying his request for presumed father status with respect to his two daughters, K.K. (born in February 2014) and T.K. (born in July 2015), and terminating his parental rights pursuant to Welfare and Institutions Code section 366.26.[1] He claims he qualifies as a presumed father because he signed a voluntary declaration of paternity (VDOP) at T.K.'s birth. Alternatively, he claims he is entitled to this elevated status because he held out both children as his own after they were born. We conclude he has failed to establish either of his claims and affirm.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On September 22, 2015, the San Mateo County Human Services Agency (Agency) received a referral alleging that R.C. (Mother) and S.K. had engaged in a verbal and physical domestic violence altercation where the children were present and in the path of violence. Mother reportedly threw hot wax from a candle at S.K. and also hit him on the head multiple times with a cell phone, causing a noticeable lump on the back of his head. Both parents were arrested. Mother was arrested for domestic violence and child endangerment. S.K. was arrested for a warrant violation on an unrelated criminal matter and for violating a criminal protective order that had been issued on October 30, 2014, following another domestic violence incident between the parents.

S.K. and Mother both stated that they were never married, but confirmed that S.K. is the children's biological father. Mother had eight other children not living with her, who were either living with their fathers or extended family members. There were 16 prior child welfare referrals on Mother from July 1998 to July 2015, including three substantiated referrals for general neglect and three substantiated referrals for severe neglect. Mother had a history of methamphetamine/amphetamine use, including giving birth to babies who tested positive for drugs.

On September 23, 2015, the Agency entered into a voluntary placement agreement with Mother and the children were placed in a foster home.

On October 10, 2015, Mother requested to terminate the agreement, and the children were released to her.

On October 13, 2015, the Agency filed petitions asserting the children came within section 300, subdivision (b). The Agency alleged the children were at a substantial risk of suffering serious emotional harm and neglect as a result of the parents' history of domestic violence and substance abuse. The Agency alleged, in part, that the parents' pattern of domestic violence had culminated in a criminal protective order, which the parents had violated on at least four occasions.

At the contested detention hearing on October 15, 2015, the juvenile court ordered Mother to participate in counseling and therapy. The court advised that the Agency should petition to detain the children if S.K. were to come to the family home. S.K. was granted supervised visitation once a week for one hour.

On November 2, 2015, the Agency filed amended petitions. The Agency alleged that Mother had tested positive for methamphetamine and had failed to follow through with a toxicology retest. The amended petitions also alleged that S.K. had violated the existing restraining order, citing to Mother's statement that he came by "all the time." Reportedly, S.K. was arrested on October 25, 2015, for violating the restraining order. The social worker had tried to contact S.K. several times but had been unsuccessful.

On November 3, 2015, the juvenile court ordered the children detained.

According to the jurisdiction/disposition report filed on December 10, 2015, S.K. had yet to contact the social worker or the Agency. The social worker had called and left multiple messages and had also sent him three certified letters. An absent parent search was requested on October 22, 2016, and a due diligence report had been prepared. The Agency recommended that Mother not receive reunification services because she had failed at family reunification in the past. It also recommended no reunification services be provided to S.K. because he had not elevated himself to more than alleged father status.

In an addendum report filed on January 26, 2016, the social worker indicated that S.K. still was not in communication with the Agency. Certified mail and other mail had been sent to his last known address notifying him of the Agency's recommendation to not provide him with reunification services.

The jurisdiction/disposition hearing was held on February 2, 2016. Neither parent appeared for the hearing, and the juvenile court found the Agency had exercised due diligence in attempting to notify them of the proceedings. The court sustained the amended petitions' allegations and ordered Mother bypassed for reunification services. It

also ordered supervised visitation for both parents. The court set the matter for a section 366.26 hearing.

On February 13, 2016, the Agency served notice of the section 366.26 hearing on S.K. by leaving the documents with his mother, who also resided at S.K.'s last known address.

In a declaration filed on April 4, 2016, concerning the unknown whereabouts of both parents, the social worker reported that S.K. had contacted her on March 4, 2016, but was not able to provide her with an address or a phone number where he could be reached. She gave him verbal notice of the section 366.26 hearing along with his attorney's contact information. He was informed that his parental rights might be terminated.

The Agency's section 366.26 report was filed on May 12, 2016. The Agency reported that the children were considered adoptable and preplacement visits with a prospective adoptive family had begun. The children had attended three supervised visits with S.K. He was appropriate with both children and no concerns were identified. The Agency also pointed out that S.K. had failed to respond to the Agency for six months while knowing the children remained in foster care.

On May 24, 2016, S.K. filed a Statement Regarding Parentage (Juvenile) (form JV-505) requesting a judgment of parentage, seeking to be elevated from alleged to presumed status. He asserted he had always given the children clothes, food, and necessities, and stated he had signed a VDOP when T.K. was born. A copy of a VDOP was not included with the form.

On that same day, the juvenile court held the section 366.26 hearing. S.K. appeared and testified that he had been in a relationship with Mother for four years. He was the biological father of both girls, and stated that he had been present at T.K.'s birth and had signed her birth certificate. Additionally, he related that he had held both children out to the community as his own, and had stayed with them in their home. He

told other family members, friends, and coworkers that the girls were his children. He indicated that he had paid for their diapers, food, and clothes on a regular basis, and said that he played with, read books to, and sang with K.K. daily. He also accompanied Mother to the children's doctor appointments.

When asked why he had waited so long to contact the Agency, S.K. said he had detached himself from Mother after the children were detained because he was afraid to violate the restraining order. He believed that Mother would pursue reunification to the fullest extent possible, and he found out late that she had not done so. Though he had ceased contact with Mother, he heard about her from others in their "similar circle," particularly Mother's sister. When he learned Mother was not pursuing reunification services, he made contact with the Agency and began visiting with the children. He requested reunification services as a presumed father. On cross-examination, he stated his understanding that the restraining order required him to stay away from both Mother and the children. He admitted he had received notices of the dependency hearings in the fall of 2015, as well as communications from the Agency in the form of letters and calls.

At the close of testimony, S.K.'s attorney argued that under Family Code section 7611, subdivision (c), S.K. qualified for presumed father status because his name was on T.K.'s birth certificate, which meant that he must have signed a VDOP at the hospital. When it was argued that S.K. had, in fact, signed a VDOP, the juvenile court stated: "There is no document before me. I don't have a document."

The juvenile court then terminated Mother's and S.K.'s parental rights. The court denied S.K.'s request for presumed father status. S.K. filed an appeal on May 26, 2016. Mother has joined his appeal but has not raised any separate grounds.

DISCUSSION

I. Presumed Fathers

S.K. asserts he is entitled to "presumed father" status. In dependency proceedings, "fathers" are divided into several different categories. " 'The extent to which a father

may participate in dependency proceedings and his rights in those proceedings are dependent on his paternal status.' " (*In re Christopher M.* (2003) 113 Cal.App.4th 155, 159.) An alleged father is not entitled to appointed counsel or reunification services, and due process requires only that he " 'be given notice and "an opportunity to appear and assert a position and attempt to change his paternity status." ' "[2] (*Id*. at pp. 159–160.) A presumed father is eligible to have custody of his children, appointed counsel, and reunification services. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448–449; *In re O.S.* (2002) 102 Cal.App.4th 1402, 1410 (*O.S.*); §§ 317, 361.2, subd. (a), 361.5, subd. (a).)

A father who claims he is entitled to presumed father status bears the burden of establishing the facts supporting his claim by a preponderance of the evidence. (See *In re T.R.* (2005) 132 Cal.App.4th 1202, 1210.) We review the juvenile court's determination of parentage for substantial evidence. (*In re M.C.* (2011) 195 Cal.App.4th 197, 213.) We indulge all reasonable inferences in favor of the juvenile court's decision. (*Garrett v. Duncan* (1959) 176 Cal.App.2d 296, 298–299.)

II. Voluntary Declaration of Paternity

S.K. first asserts that he has presumed father status because he signed a VDOP when T.K. was born. The evidence in the record does not support his assertion.

A completed VDOP executed in compliance with statutory requirements entitles a father to presumed father status in dependency proceedings. (*In re Liam L.* (2000) 84 Cal.App.4th 739, 745 (*Liam L.*); see *In re Levi H.* (2011) 197 Cal.App.4th 1279, 1289.) On appeal, S.K. contends that "[a]t least as to [T.K.], [he] was her presumed father because he was at the hospital *and he signed the* [*VDOP*] *at the time of her birth.*" (Italics added.) While he did check the box on his May 24, 2016 form JV-505, indicating that he signed a VDOP on the date of T.K.'s birth, the claim is not supported by an actual

[2] Although S.K. did not attend the October 2015 detention hearing, counsel was appointed for him.

document or by any other direct evidence. Significantly, at the section 366.26 hearing he did not testify that he had ever signed a VDOP. When asked if he had signed any documents in the hospital, he responded: "I signed the birth certificate." No other evidence was presented regarding the possible existence of a VDOP.

Apparently aware that there is scant evidence to show that he completed the document, S.K. blames the juvenile court for failing to fulfill its duty to inquire about and attempt to determine whether he had signed a VDOP. Specifically, he argues that the court failed to comply with California Rules of Court, rule 5.635(d)(2),[3] which provides that where the issue of parentage is addressed by the court, it must "direct the court clerk to prepare and transmit *Parentage Inquiry—Juvenile* (form JV-500) to the local child support agency requesting an inquiry regarding whether parentage has been established through any superior court order or judgment or through the execution and filing of a voluntary declaration under the Family Code."

Preliminarily, we note section 316.2 establishes the juvenile court's duty of inquiry: "At the detention hearing, or as soon thereafter as practicable, the court shall inquire of the mother and any other appropriate person as to the identity and address of all presumed or alleged fathers." (§ 316.2, subd. (a).) Among other things, the statute requires the court, as it deems appropriate, to inquire "[w]hether any man has formally or informally acknowledged or declared his possible paternity of the child, including by signing a [VDOP]." (§ 316.2, subd. (a)(5); see rule 5.668(b)(5).) As S.K. notes, the Rules of Court provide that a court must direct the court clerk to inquire of the local child support agency to determine whether parentage has been established through a court order or judgment or through a voluntary declaration of paternity. (Rule 5.635(d)(2).) This latter requirement, however, exists only when "the issue of parentage is addressed *by the court*." (Italics added.)

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[3] All further rule references are to the California Rules of Court.

As section 316.2, subdivision (a) states, the juvenile court's initial duty to inquire about paternity is limited to the duty to identify and locate potential fathers, not to inquire as to the particular status of a man who may be a child's father. In the present case, it was established early on that S.K. was an alleged father of the two girls. Thus, there was no need for the court to conduct any further inquiry to determine whether he was a presumed father, rather than merely an alleged father.

Instead, it was S.K.'s responsibility to come forward and ask the court to address his status as a presumed father, including supporting his request with actual evidence. (See *O.S.*, *supra*, 102 Cal.App.4th at p. 1410 ["To be declared a presumed father under Family Code section 7611, a man must ask the trier of fact to make such a determination *and establish the existence of the foundational facts by a preponderance of the evidence*. [Citation.] . . . [T]he court *cannot sua sponte make such a declaration* . . . ." (Italics added, fn. omitted.) S.K.'s status as a presumed father was never at issue before the section 366.26 hearing, which was held on the same day he filed his form JV-505.

The juvenile court was not responsible for this delay. Of his own volition, S.K. chose to absent himself from the proceedings up until the final hour, at a point where his reunification services had already been terminated. In spite of admittedly having received prior notice of the proceedings, he showed no interest in participating until after the section 366.26 hearing had already been set. For example, he did not request reunification services, nor ask that any of his relatives be considered for placement when the children were detained. Instead, when notified of the children's initial detention he reportedly told the social worker: "Fuck you guys. I hope you burn in hell." Under these facts, we fail to see how the juvenile court was under a duty to conduct any independent inquiry into his paternal status.

Rule 5.635(e) applies where a court finds that parentage of a child has not been previously determined. That provision states: "If the local child support agency states, or if the court determines through statements of the parties or other evidence, that there has

been no prior determination of parentage of the child, the juvenile court must take appropriate steps to make such a determination." This subdivision applies to this case, rather than rule 5.635(d), as argued by S.K., because here the juvenile court concluded there had been no prior determination of parentage, observing: "There is no [VDOP] document before me. I don't have a document." It is under these circumstances that an alleged father and his counsel are required to complete the form JV-505. The court then "may make its determination of parentage or nonparentage based on the testimony, declarations, or statements of the alleged parents." (Rule 5.635(e)(3).) This is the procedure that was followed in this case.

We also agree with the Agency that there is no direct evidence S.K. ever signed a VDOP. Further, on appeal he does not argue for the existence of any presumption that he signed a VDOP, though he did raise that argument at trial. The only basis for presuming that he did sign a VDOP would be Health and Safety Code section 102425, subdivision (a)(4)(C), which provides that "[i]f the parents are not married to each other, the father's name shall not be listed on the birth certificate unless the father and the mother sign a voluntary declaration of paternity at the hospital before the birth certificate is prepared." In addition, Evidence Code section 664 provides that "[i]t is presumed that official duty has been regularly performed."

The appellate court in *In re Raphael P.* (2002) 97 Cal.App.4th 716, 736–739 (*Raphael P.*) held that because the statutory scheme concerning the preparation of birth certificates and VDOPs imposes certain official duties on hospital staff, under appropriate circumstances the appearance of an unwed father's name on a birth certificate can give rise to a presumption that the mother and father executed a voluntary declaration of paternity, shifting the burden of proof to any party wishing to deny the existence of the declaration. The presumption does not apply here, however, because the record contains no evidence that any members of the hospital staff were aware that Mother and S.K. were not married. (See *In re D.A.* (2012) 204 Cal.App.4th 811, 826–827.)

Not only are there are no copies of any VDOP document in the record, there is no evidence that any such document was filed with the responsible state agency. Only "a voluntary declaration of paternity that is in compliance with all the requirements of [Family Code] section 7570 et seq. . . . entitles the father to presumed father status in dependency proceedings." (*Liam L., supra,* 84 Cal.App.4th at p. 747; see *Raphael P., supra,* 97 Cal.App.4th at pp. 722–723.) As there is no evidence that the VDOP, if it exists, complied with the requirements of the Family Code, we cannot determine on this record whether S.K. has established presumed father status through a VDOP. Because the evidence in the record here is thin at best, we are unwilling to conclude the juvenile court committed any error in refusing to recognize S.K. as a presumed father on the basis of his having allegedly signed a VDOP.[4]

III. S.K. Did Not Otherwise Qualify for Presumed Father Status

Contrary to S.K.'s arguments on appeal, we agree with the juvenile court that there is no substantial evidence he "received" the children into his home, including no substantial evidence of the factors courts have considered in determining whether a man has fully committed to care for a child. Under Family Code section 7611, subdivision (d), a man is presumed to be the father of a child if he "receives the child into his . . . home and openly holds out the child as his . . . natural child." A man seeking the benefit of the presumption has the burden of proving the foundational facts of the presumption by a preponderance of the evidence. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647,

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[4] The timing of S.K.'s request is significant. We note that once reunification services are terminated and a section 366.26 hearing is set, the primary focus is on the child's need for permanency and stability; a parent's interest in the care, custody and companionship of the child is no longer paramount. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309–310; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Angel B.* (2002) 97 Cal.App.4th 454, 464.) Children have a fundamental right to a placement that is stable and permanent. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.) Termination of reunification services "ordinarily constitutes a sufficient basis for terminating parental rights." (*In re K.C.* (2011) 52 Cal.4th 231, 236–237.)

1653.) We apply a substantial evidence standard to our review of the juvenile court's initial finding that the presumption of presumed father status was met pursuant to Family code section 7611, subdivision (d). (*Ibid*.) That is, "we review the facts most favorably to the judgment, drawing all reasonable inferences and resolving all conflicts in favor of the order. [Citation.] We do not reweigh the evidence but instead examine the whole record to determine whether a reasonable trier of fact could have found" as decided. (*Id.* at p. 1650.)

"In determining whether a man has 'receiv[ed a] child into his home and openly h[eld] out the child' as his own . . ., courts have looked to such factors as whether the man actively helped the mother in prenatal care; whether he paid pregnancy and birth expenses commensurate with his ability to do so; whether he promptly took legal action to obtain custody of the child; whether he sought to have his name placed on the birth certificate; whether and how long he cared for the child; whether there is unequivocal evidence that he had acknowledged the child; the number of people to whom he had acknowledged the child; whether he provided for the child after it no longer resided with him; whether, if the child needed public benefits, he had pursued completion of the requisite paperwork; and whether his care was merely incidental." (*In re T.R., supra*, 132 Cal.App.4th at p. 1211.) Ultimately, the question is whether the man demonstrated a " ' "full commitment to . . . paternal responsibilities—emotional, financial, and otherwise." ' " (*In re A.A.* (2003) 114 Cal.App.4th 771, 779.)

There is no substantial evidence that S.K.'s conduct met the factors identified as relevant in *In re T.R.* Specifically, there is no substantial evidence that the children ever resided in his home or that he ever stayed more than occasionally in Mother's home with the children.[5] Nor is there evidence that he actively helped Mother in prenatal care, paid

[5] Reportedly, S.K. had been living with Mother since September 12, 2015, 10 days before the police were called on a report of a domestic disturbance.

any pregnancy or birth expenses, promptly took legal action to maintain custody of the girls when they were removed from Mother's home, provided for them at any time, cared for, or pursued public benefits on behalf of either child, or that his care for them (such as by providing diapers, food, and clothing) was more than incidental. In particular, after the girls were detained in November 2015, S.K. simply vanished once he made bail and did not contact the Agency regarding his children until March 2016. Even then, as the Agency correctly notes, he did not challenge his status as an alleged father until the last minute, at the section 366.26 hearing when he signed and filed the Statement Regarding Parentage on May 24, 2016.

As for holding himself out to the world as the father of the children, the juvenile court observed it had only S.K.'s word that he had told many people the children were his. The court noted that he produced no witnesses or other evidence to verify his assertions. As the trier of fact, the juvenile court is the "exclusive judge of the credibility of the evidence and can reject evidence as unworthy of credence," including the testimony of a witness. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) Consequently, the court was entitled to reject S.K's testimony entirely as lacking credibility. (*Ibid*.) Additionally, the social aworker testified that she had spoken to S.K.'s mother, who said that "[s]he never met [the children] and had no relationship with them, so she was not interested in placement." In sum, substantial evidence supports the court's conclusion that S.K. did not meet the standards for presumed father status.

DISPOSITION

The orders appealed from are affirmed.

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Dondero, J.

We concur:

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Humes, P. J.

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Margulies, J.